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IN THE

Supreme Court of the United States

October Term, 1961

No. 576

WILLIAM WILLIAMS, BARTHOLOMEW CANNIZZARO, LOUIS ANGRISANO, PASQUALE NATARELLI, ROBERT RAINEY, SAMUEL FRANGIMORE, NELSON WILLIAMS, PHILIP DiBLASIS, JOE D. BROWN, RALPH DiBLASIS, STEVEN CANNAROZZO, JOSEPH S. OCCHINO, ERNEST MOULSON, VINCENT J. OCCHINO, MONROE VINSON,

Petitioners,

v.

HON. CARMAN F. BALL, District Attorney of Erie County,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

(Numerals in parentheses are references to pages in the petitioner's printed petition.)

The opinion of the United States Court of Appeals for the 2nd Circuit is reported at 294 F. 2d 94, while the opinions of the District Court are recorded at 194 F. Supp.

393 (on the question of the petitioner's request for an injunction) and at page 29 in the appendix of the petitioner's present petition for certiorari (on the respondent's motion to dismiss this action).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 31, 1961 (23). The petition for a writ of certiorari was filed November 29, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 1 (b) of Rule 19, of the Rules of this Court on the ground that substantial questions involving

1. the constitutional rights of the petitioners, and
2. the decisions of the Courts below,

have not, but should be settled by this Court.

Questions Presented

1. Is wire tapping, particularly the divulgence of the information obtained therefrom by a state officer in a state criminal proceeding, done pursuant to, and in compliance with a state statute and constitution, prohibited by:
   (a) the United States Constitution and/or
   (b) 47 U. S. C. 605 (The Federal Communications Act)?
2. Is the procedure used here by the petitioners, the proper manner in which to raise the substantive issue presented?

Statutes Involved

The Statutes involved are as follows:

1. Article I Section 12 New York State Constitution

   (set forth in the petition for certiorari at page 33)

2. Section 813-a New York Code of Criminal Procedure

   (set forth in the petition for certiorari at page 33)

3. 47 U. S. C. 605

   (pertinent portion set forth in the petition for certiorari at page 34)

4. 28 U. S. C. 1337

   "Section 1337. Commerce and anti-trust regulations

   The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce • • •"

5. 28 U. S. C. 1343 (3)

   "Section 1343. Civil rights and elective franchise

   The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

   • • •

   (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

   • • •"

6. 28 U. S. C. 2281

   "Section 2281. Injunction against enforcement of State statute; three-judge court required

   An interlocutory or permanent injunction restraining the enforcement, operation or execution

of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

7. 42 U. S. C. 1983

"Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

8. Article I, Section 8, United States Constitution (pertinent portion)

"Section 8. • • •

To regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes;

• • •"

9. Amendment X, United States Constitution

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

10. Amendment XIV Section 1, United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

11. Article VI, United States Constitution

"• • •

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

• • •"

Statement of the Case

Each of the petitioners were indicted in April 1960 by an Erie County Grand Jury charging them with the crimes of conspiracy and contriving a lottery in violation of Sections 580 and 1372 of the Penal Law of the State of New York. Each defendant pled not guilty to such charges and while awaiting trial commenced this action for a declaratory judgment and permanent injunction on or about March 14, 1961.

Prior to the commencement of this action several of the defendants made application for an injunction on or about October 25, 1961 to the Honorable John O. Henderson, United States District Judge, Western District of New York, such application being merged by consent into the present proceeding.

While originally the action was directed against other law enforcement officials of the State of New York (*i.e.* Hon. Arthur J. Cornelius, Jr., Superintendent New York State Police; Hon. Louis J. Lefkowitz, Attorney General, State of New York, and the Commissioner of Investigation of the State of New York), by consent an order was entered by the District Court on August 11, 1961, discontinuing the action against all defendants except to present respondent.

The purpose of the action was to restrain the respondent here—the District Attorney of Erie County—from using at the trial of the indictment certain wire tap evidence used in securing such indictment. It stands admitted that such evidence will form an important part of the People's case at trial.

The theory upon which the relief was requested was that the constitutional or at least the statutory rights of the defendants as United States citizens or subjects were or are to be violated and that the declaratory judgment and permanent injunction were the only means by which the defendants could avoid irreparable injury.

The petitioners' request for a temporary injunction and a three-man court to decide the constitutional claim was denied on June 7, 1961, and the respondent's motion to dismiss the action for failing to state a sufficient claim was granted August 22, 1961. Both orders were affirmed on appeal by the United States Circuit Court of Appeals for the 2nd Circuit on August 31, 1961.

ANSWER TO THE APPLICATION MADE

1. On the Substantive Question

Reviewing the contentions made, it can be stated with a considerable degree of certainty that the use of wiretap evidence involved here is constitutionally permissible. *Olmstead v. United States*, 277 U. S. 438 (1928), *Goldman v. United States*, 316 U. S. 129, 135-136 (1942) but see *Silverman v. United States*, 365 U. S. 505 (1961). These cases hold that such conduct does not violate the 4th and 5th Amendments of the United States Constitution, and this writer knows of no authority holding that the 14th Amendment of such Constitution confers broader or greater rights than those particularized in the first ten amendments, though it is appreciated that this Court constantly re-examines its decisions and varies the scope and sweep of the Constitutional provisions as it sees fit in view of changing conditions. See *Mapp v. Ohio*, 367 U. S. 643 (1961).

Thus up to now, the restrictions on the use of wire tap have come from either state constitutional or statutory prohibitions or Federal legislation, *Nardone v. United States*, 302 U. S. 379 (1937), here in particular, 47 U. S. C. 605, Section 813-a New York Code of Criminal Procedure and Article I, Section 12 New York State Constitution.

It stands conceded that the wiretaps here were made in compliance with the New York State constitutional and statutory provisions so that the only question remaining is the effect, if any, of 47 U. S. C. 605. While it is true that such section was given sweeping effect, *Nardone v. United States, supra*, *Weiss v. United States*, 308 U. S. 321, to the point that all use of wiretap, regardless how made, by federal officers, was prohibited, not until *Benan-*

ti v. United States, 355 U. S. 96 (1957) was it ever unequivocally stated by this Court, even though *in dictum*, that such use by a state official, though sanctioned by state law, was a federal violation. To the contrary this Court implied otherwise.

> "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."
>
> *Schwartz v. Texas*, 344 U. S. 199, at pages 302, 303.

As a result the New York Court of Appeals has continually reaffirmed its decision in *People v. Stemmer*, 298 N. Y. 728 (1948), affirmed—equally divided court 336 U. S. 963, petition for rehearing denied 337 U. S. 921, to the effect that a wiretap conducted in accordance with New York Law is not a violation of 47 U. S. C. 605.

People v. Saperstein, 2 N. Y. 2d 210, cert. denied 353 U. S. 946 (1957);

People v. Graziano, 4 N. Y. 2d 881, cert. denied 358 U. S. 851 (1958);

People v. Broady, 5 N. Y. 2nd 500, 6 N. Y. 2nd 814, cert. denied and appeal dismissed *per curiam* 361 U. S. 8 (1959);

People v. Dinan, 6 N. Y. 2nd 715, cert. denied 361 U. S. 839 (1959).

Faced with this conflict, and were it not for the procedural problem involved, the Respondent as a responsible

law officer, would be happy to join in the application made if it would result in a definitive ruling by this Court of the substantive issues thus presented.

While it is true that this Court gave at least tacit approval of the Circuit Court's determination permitting use here, in its decision in *Pugach v. Dollinger*, 365 U. S. 458, affirming 277 F. 2nd 739 (2 Cir. 1960), the short terse comment accompanying such decision has left state law enforcement officers in the harrowing position of having authority to substantiate the use of wire tap evidence in State trials, *Schwartz v. Texas*, 344 U. S. 199 (1952) but subjecting themselves to possible Federal prosecution if they do so. *Benanti v. United States*, 355 U. S. 96 (1957), *Pugach v. Dollinger*, *supra*, concurring opinion of Waterman, J., Circuit Judge, at page 746. Faced with the sworn duty of using every bit of evidence legally permissible in securing the proper obedience to the law, the dilemma imposed upon them is grossly unfair, and in contradiction to the efforts now being made to secure just enforcement of the law. Is it less of a wrong to leave a law enforcement officer at sea than it is a defendant? No, a proper concept of justice eliminates traps and pitfalls not only for the defense but also for the prosecution in its search for the truth.

It may well be that this is an area for legislative concern (this perhaps being a reason for the terse opinion in *Pugach v. Dollinger*) but sometimes however Congress needs prodding. Contrary to some belief, its lack of specific action can also be interpreted as a feeling that the courts will solve the problem through "interpretation".

Concluding then, we see an area where the guiding hand of this Court would be helpful; it being for this Court to decide whether now would be a propitious time to act.

2. On the Procedural Question

The procedural considerations which led the lower courts in this instance to deny the petitioners' application have been fully developed in the respective opinions rendered and need not be restated here. It is these same considerations which prompted this Court to affirm the same Circuit Court's decision in *Pugach v. Dollinger*, *supra*, a situation identically similar, not only on the authority of *Schwartz v. Texas*, but also on the authority of *Stefanelli v. Minard*, 342 U. S. 117.

The Petitioners' other contentions that they could not raise the substantive question on appeal upon conviction does not appear sound in view of the latitude of 28 U. S. C. 1254 (3) and the just willingness of this Court to review substantial federal questions. See *People v. Stemmer*, *supra*.

CONCLUSION

For the foregoing reasons, while a substantial federal question has appeared, it is respectfully submitted that the procedural considerations compel a denial of the petition for a writ of certiorari.

January 24, 1962.

Respectfully submitted,

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